United States
Circuit Court of Appeals

For the Ninth District

MAX WOLF,
Plaintiff in Error,

vs.

J. M. EDMUNSON and M. J. EDMUNSON,
Defendants in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

J. M. WILLIAMS and
LOUIS E. BEAN,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE

This action was brought by plaintiff to recover advances amounting to $3,001.00 on a hop contract for the purchase of 30,000 pounds of hops of the defendants, during the season of 1912. The hops were to be

of first quality, that is: sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter and not affected by spraying or vermin damage. That the defendants grew some 40,000 pounds of hops upon their premises, and upon inspection of the said hops plaintiff avers that they were found to be slack dried, bad and uneven in color, of unsound condition, not fully matured, not properly dried or cured, and affected by vermin damage. Plaintiff introduced numerous expert hop inspectors as witnesses, who gave testimony that the said hops, upon inspection, were of a bad and uneven color, of an unsound condition, not fully matured, not properly dried and cured, and that they were affected by vermin damage. The contest between the parties turns around these points.

The defendant set up an affirmative answer that the hops raised by him complied with the contract and that the plaintiff's agents rejected the hops on the ground that the prices had gone down, and were unfair in their inspection, and asked for an affimative judgment in the sum of $900.00.

ASSIGNMENT OF ERRORS

I.

The Court committed error in permitting Ross H. Woods, one of the plaintiff's expert witnesses to answer the following question on cross examination,

over the objection of plaintiff as follows: Said witness was testifying with reference to the color of the hops and was asked this question:

Q. What you men mean to get at is the general average of the crop?

Objected to as incompetent, irrelevant and immaterial, which objection was overruled by the Court, and to which plaintiff saved an exception.

The witness answered: Well, yes. There was some of them green in each sample and some of them were ripe, mixed as you were talking a while ago about where those were dumped off the kiln floor.

(Record, pp. 26-123.)

II.

The Court committed error in permitting J. M. Edmunson, who was called as a witness in his own behalf, to answer the following question in attempting to discredit the inspection made by the plaintiff's experts:

Q. Now, what is your experience with hop inspectors as to their being uniform in their judgment as to the quality of hops?

Which question was objected to by plaintiff as incompetent, irrelevant and immaterial.

COURT:—I think that is an inquiry about the quality in effect of the hops. You may answer.

To which ruling the plaintiff duly saved an exception, which exception was allowed by the Court.

The witness answered: I find that they vary con-

siderable, one will call a hop prime and the other medium, etc., they will vary as much as one grade and some vary two grades.

(Record, pp. 27, 147.)

III.

The Court erred in permitting the defendant, J. M. Edmunson, to answer the following question, over the objection of the plaintiff:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st day of October, that you had 30,000 pounds of hops there of the quality described in that contract?

(Record, pp. 27, 148.)

To which question plaintiff objected as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness on this matter.

COURT:—He says he inspected the hops, he can give his judgment as to that amount; to which ruling of the Court the plaintiff duly excepted, which exception was allowed by the Court, and witness answered:

I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds according to my recollection, in the whole crop.

John Edmunson had already testified as follows:

(Record, p. 145.)

Q. Now, from your inspection of those hops, what would you say as to their quality?

A. I call them a good hop.

Q. What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds of choice hops in the lot.

COURT.—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they call the ripe end. That was the seven or eight bales that they called over-ripe, and the ends of the leaves were turned red.

COURT.—That is the last picking.

A. That was the last picking, your Honor. What they would grade those, I could not say exactly.

IV.

Bert Pilkington was called as a witness on behalf of the defendants, and after testifying to his qualifications as a chemist, as more fully shown hereafter in quotations from Bill of Exceptions, and while testifying in regard to the chemical analysis of the hops was interrupted by the objections to the witness' testimony along the line of chemical analysis of hops as incompetent, irrelevant and immaterial and an attempt to impose in this case a standard different than that of the hop men. (Record, pp. 28, 188.) The Court made the following ruling:

There has been testimony here coming from

the witnesses produced by the plaintiff touching the amount of resin or pollen, as it has been described, or the lupulin that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. To which ruling an exception was duly saved.

The said ruling is assigned as error. The Court committed error in overruling the objection and in making the said ruling.

V.

The Court erred in permitting the witness, Bert Pilkington, to testify with reference to a sample of hops furnished him by J. M. Edmunson.

(Record, pp. 29, 189.)

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial; to which ruling an exception was duly saved. The witness answered: Why, the sample Edmunson handed me had 18.15 per cent total resin, and of that total resin, there was 16.24 what is known as soft resin.

VI.

The witness, Bert Pilkington, testified that he had received from hop growers and dealers samples of hops marked with the grading, and the Court

committed error in permitting said witness to answer the following question:

(Record, pp. 29, 193.)

What quality of hops were they claimed or styled to be, and the previous objection was renewed, which was that the testimony is incompetent, irrelevant and immaterial, a matter of hearsay only. The witness was not competent to judge. The objection was overruled, to which ruling an exception was duly allowed. Witness answered:

Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

The Court then asked the witness if he knew what a choice hop is in the market, and he answered: I cannot go out in the market and pick out a choice hop by just going around and feeling of it, or looking at it.

VII.

After some colloquy between the Counsel and the Court, and questions by the Court, the Court sustained the objections to this witness testifying with reference to the quantity of resin in the samples of hops sent him by other parties, and was excused.

The Court afterwards had the witness recalled and permitted him to testify over the objection of the plaintiff as incompetent, irrelevant and immaterial, and hearsay, which objection was overruled by the Court and exception duly allowed.

That the Court committed error in reversing the ruling and permitting the said witness to testify. The witness testified as follows:

One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent; No. 2 Judge, 1911 crop, prime, 19.04 per cent. Now prime 1910 crop, by Judge No. 1, 15.95 per cent total resin. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

(Record, pp. 30, 31, 202, 203.)

VIII.

That the Court erred in overruling the motion made by plaintiff to strike out all the testimony of the said witness, Bert Pilkington, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever this is, is a choice hop, or a hop that is a first quality under this contract, which motion was overruled by the Court, and the Court duly allowed an exception thereto.

(Record, pp. 31, 206.)

The material testimony given by the witness, Bert Pilkington, with the objections thereto and the rulings thereon and exceptions are more fully shown by quotations from the Bill of Exceptions for the purpose of showing the materiality of the said objections, and said motion is as follows:

(Record, pp. 31 to 41, 185 to 207.)

The witness testified that he was a graduate chemist, was employed in the chemical department of the Agricultural College of the State of Oregon, since 1905; that he had undertaken an investigation of the characteristics of hops.

Q. Please explain the character of the work?

A. Well, for instance, one of the particular features was a revision of the method of chemical examination of hops.

Q. What was the final object in obtaining this process of chemical analysis?

A. The thing that led up to that was the variation, or so-called variation, in the examination or the commercial judging of hops. And the attempt at that time—it was taken up as an Adams project, under the Adams fund, by the Federal Government, to see if they could arrive at some definite method for examining hops, whereby hops would be given examination according to their worth.

Q. Did you examine some samples of hops that he sent you in 1913?

A. Yes, sir, I did.

Q. About what time in the year was that?

A. That was somewhere between the 1st and the 10th of June, if I remember right. I don't remember the exact date.

Q. Now, did you make a chemical analysis of those hops to ascertain the amount of brewing quality in them?

A. Well, the chemical analysis shows the resin quantity.

MR. WILLIAMS:—We desire to make the objection to this witness' testimony along that line for the reason that it is incompetent, irrelevant and immaterial, and an attempt to impose in this case a standard different from that of the hop men.

COURT:—There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. You may proceed.

MR. BEAN:—We save an exception.

Q. Now, Professor Pilkington, you said you made a chemical analysis of these hops?

A. That Mr. Edmunson furnished me?

Q. Yes.

A. I did.

Q. And according to the scientific method used for that purpose?

A. Yes, sir.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think I will hear that. The objection will be overruled.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, the sample Mr. Edmunson handed me had 18.15 per cent total resin, and of that total resin there was 16.24 what is known as soft resin.

COURT.—What?

A. Soft resin. You might say there were three resins in the hop.

Q. What was the third resin?

A. That is what they call a hard or worthless resin. That amounts to the difference between the total resin and the soft resin; three resins comprising the makeup of that part of the hop.

Q. Did you ever make any examination of this kind of hops that are pronounced by experts as choice hops?

Objected to as incompetent, irrelevant and im

material.

COURT:—Do you know what a choice hop is, in your experience; that is, choice hop measured by the commercial rule?

A. No. sir, I do not.

COURT:—You do not?

A. No. sir.

MR. SLATER:—Your Honor, I want to show that the percentage of resin found in this particular sample of hops—its relation to the percentage found in the hops of different qualities that he examined.

COURT:—Well, unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. If you can show by this witness that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.

Q. Now, what different qualities of hops were these samples that you received; represented to you to be, by those who gave them to you?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial; matter of hearsay only. The witness was not competent to judge.

Objection overruled. Exception allowed.

A. Do you mean by that the grading?

Q. Yes, what quality of hops were they claimed or styled to be?

MR. WILLIAMS:—I desire to renew our objection, your Honor.

Objection overruled. Exception allowed.

MR. SLATER:—That will be understood.

A. Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

COURT:—Do you know what a choice hop is in the market?

A. I couldn't go out in the market and pick up a choice hop, just by going around and feeling of it, or looking at it.

COURT:—Do you know the amount of resin there should be in a choice hop as sold in the market?

A. That would depend on who judge the hop.

COURT:—That would depend on what?

A. That would depend on who graded the hop, whether it was a choice hop, or prime hop, or medium hop. That was what this work was for. I might say, in explanation, what this work was for was to compare these different gradings by different judges.

COURT:—Then there is no uniformity in grading?

A. Not according to these different judges; they don't agree.

MR. WILLIAMS:—That is the very vice, your Honor.

COURT:—That is the kernel of the cocoanut in this case, it seems to me, the very thing we are try-

ing to get at now. Now, if you know what a choice hop is in the market, why then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question.

MR. SLATER:—Your Honor, I think his testimony may be relevant to show the percentage of resin in this particular hop as compared with other samples of hops known in the market as choice, medium and prime, the percentage that might be in them. It is true this witness might not be competent to testify that he can pick out a choice hop.

COURT:—He says he doesn't know, of his own knowledge, what a choice hop is; nor a prime, nor medium. He says that knowledge he has comes from samples of hops that have been sent to him which have been represented to be so and so. Then he says the judges themselves don't agree upon what is a choice hop, and the amount of resin that should be contained in a choice hop. That is the trouble in making the comparison here.

MR. SLATER:—Well, your Honor, in order to make the record than, we desire to show by this witness that this witness made chemical analysis of a large number of different grades of hops, and that the averages run from 13.49 per cent; and that the minimum percentages for the year in which he made the examination in question was 15:54 per cent; the

maximum was 20.49 per cent, and the average 18.06 per cent. That is the testimony that we offer to show by this witness.

COURT:—You don't know, of your own knowledge, about the samples, whether they were choice or prime or medium as to quality?

A. No. We didn't care for that on this other work we were undertaking. We asked—if I may make an explanation there?

COURT:—Yes.

A. We asked that these judges, or asked that Mr. Livesley to send us in a sample of hops judged by different judges, and then we wanted to analyze those hops, and see how those judges agreed. Now, that was the object of that piece of work that we undertook at that time. Now, those hops were graded according to the terms on the hop market.

COURT:—You were inquiring only as to one quality, and that was the quality of the amount of lupulin?

A. No, I might say this—well, that was the standard by which we were measuring; that is, the resin—to see if the resin in a choice hop graded by Judge No. 1 would agree with Judge No. 2, or whether medium graded by one judge, a hop graded by one judge as a medium would have the minimum amount of resin equal to a choice hop graded by another judge; to see if a medium fell in a definite class—if their judgment compared as to the amount of

resin it contained.

COURT:—I don't think that that elucidated anything in this case particularly. I will sustain the objection, and you may have your exception.

Excused.

COURT:—Is Mr. Pilkington here?

MR. SLATER:—He was out in the hall a moment ago.

COURT:—I think I will take his testimony in regard to the amount of resin in the samples. After thinking that matter over, I think it would be a better ruling to let that go to the jury.

MR. WILLIAMS:—We will take an exception, if your Honor please.

COURT:—You may have your exception.

BERT PILKINGTON.—Resumed the stand. Direct examination continued.

COURT:—I have concluded that you might answer as to the amount of resin you found in these different samples. I think the manner in which you obtained the samples has been sufficiently explained heretofore. You may have your objection, and your exception to the Court's ruling.

The witness was then permitted to refer to memorandum written by him with reference to hops of different qualities.

COURT:—Well, now, who are the judges?

A. I don't know who the judges were. Mr. Livesley furnished these samples. The pamphlet

there states how those samples were procured and the object of getting those. These samples were numbered, and the grade was put with that number in the letter sent to us, and the samples forwarded at the same time.

Q. Is Mr. Livesley a regular dealer in hops, in this state?

A. Yes.

Q. An extensive dealer?

A. He was at that time, yes.

Q. Do I understand you that Mr. Livesley furnished all these samples?

A. Those samples that are given there? No. Mr. Livesley did not furnish all the samples. Mr. Seavey furnished part of the samples. If I remember right, the larger number of the samples were received from Mr. Livesley.

COURT:—I think you may give the names of gradings according to the samples sent you, the judging of those samples. Just give the general range. Take the prime, for instance. Take the choice, for instance, and then prime, and indicate it.

A. All right. One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge

No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent.

COURT:—What was that that contains 15 per cent?

A. I haven't come to that one yet. I will get that in just a minute. No. 2 Judge, 1911 crop, prime 19.04 per cent. No. .., prime, 1910 crop, by Judge No. 1, 15.95 per cent total resin.

COURT:—So the prime varies all the way from 15.95 to about 20 per cent.

A. To about 20½.

COURT:—Well, now, give the medium.

A. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

At the close of the witness' testimony, plaintiff made the following motion:

MR. WILLIAMS:—To save the question, we move to strike out all the testimony of this witness, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever this is, is a choice hop, or a hop that is of a first quality under this contract.

COURT:—The motion will be overruled. You may have your exception.

IX.

That the Court erred in denying the plaintiff's

motion for a new trial and abused his discretion by refusing to grant a new trial, which motion was based upon the following grounds, to-wit:

(Record, pp. 24, 41-44.)

First. That the verdict is against the evidence in this cause.

Second. That there is no evidence in this cause to sustain the verdict of the jury; that there is no evidence that there were 30,000 pounds or anywhere near that number of hops of the quality described in the contract produced by J. M. Edmunson during the year 1912.

That the only testimony in this cause given on behalf of the defendants that there were 30,000 pounds of hops raised by them of the quality described in the contract that could possibly tend to show that fact was the answer of J. M. Edmunson to the following question:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops there of the quality described in that contract?

A. I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds according to my recollection, in the whole crop.

That witness was testifying with reference to a

conversation he had with Mr. Hinkle with reference to quantity, said: I had more than the contract called for, and they had the privilege of selecting from the whole bunch, from all the bales, and he was asked this question:

Well, what was said, if anything, by you as to the quality of the hops?

A. I told him I thought I had hops good enough to fill the contract, a sufficient number of them.

This was all the testimony given by J. M. Edmunson along that line. He then testified in answer to this question:

What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds of choice hops in the lot.

COURT:—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they called the ripe end. That was the seven or eight bales that they called over-ripe and the ends of the leaves were turned red.

Then in answer to this question:

Now you may state to the jury to what, if any, extent any of these hops were affected by mold?

A. Well, there was about 20,000 pounds of them that didn't have any mold, you might say. I call them free of mold. And the rest of them ran along gradually until the end of the season and they had

some little mold in them; until the final end, the last day or two of picking, they had considerable mold in them and were over-ripe.

Then on cross examination, the witness was asked:

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Woods picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run, I don't know.

Then witness was asked this question: And these 20,000 pounds were not affected by spraying or vermin damage?

A. No, sir.

Q. Now, how about the second lot, John?

A. Well, the second lot had a small amount of mold in them. That was all the difference. They were really a riper and better hop.

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them anyway. They were a good prime hop, and a prime hop is not supposed to be perfect.

POINTS AND AUTHORITIES

1. "The average of the crop" does not come within the terms of the contract. There could be no

average "good and even color under the contract; nor average maturity; nor average freedom from vermin damage, etc."

8 Oregon 517-518, Tenny vs. Mulvaney.

24 Oregon 320; 33, p. 573, Johnson vs. Hamilton.

2. The question asked Mr. Edmunson with reference to his experience as to the uniformity of the judgment of hop inspectors was undoubtedly asked for the purpose of discrediting the testimony of the hop inspectors of plaintiff and his witnesses on that subject. This question would tend to prove nothing of probative value in this case; but would tend to prejudice the jury against all hop inspectors and the witnesses in particular; and this was undoubtedly its purpose.

The ruling of the Court thereon was another error. It would be impossible for Mr. Edmunson's experience with hop inspectors to have any probative value as to the quality of the hops in dispute.

The conclusion that must be drawn from this testimony for it to have any probative value is:

In the experience of Mr. Edmunson some hop inspectors differ in their judgments in the grades of hops; some one grade and some two grades; therefore all hop inspectors differ in their judgments; and because all hop inspectors differ in their judgments the plaintiff's witnesses differ in their judgments, and because they differ in their judgments generally, they should differ in their judgment of hops in this

case; therefore, not differing in their judgments in this case there is collusion among them, or therefore they are prevaricating in their testimony when they say there is no material difference in their judgments generally; and the further conclusion, therefore, the hops were, or probably were, of the quality described in the contract.

The question before the jury was whether the jury could rely upon their testimony about the quality of and defects in these hops, and testimony that some hop inspectors differed in their judgment would not prove or tend to prove that these inspectors were wrong in the particulars testified to or to discredit them.

132 Mass., at p. 224, Pond vs. Pond.

3. The defendants, under their counter claim to prevail thereon were required to prove that the defendants had 30,000 pounds of hops of the quality prescribed in the contract. Mr. Edmunson had already testified to the quantity of his hops and to the grades. That testimony fell far short of proving the counterclaim; so he was asked the direct question calling for his opinion. The question called for an opinion on the ultimate fact that the jury were required to pass upon.

39 Oregon 117, State vs. Simonis.

41 Atlantic 838, Bergen Co. Traction Co. vs. Bliss.

12 Am. & Eng. Encyc. Law (2 Ed.), 421-3.

5 Oregon 480, Wilson vs. Maddock.

The question and answer were evidently based on the assumption that hops that graded prime in the opinion of the witness were of the quality prescribed by the contract.

A question or answer which assumes a fact is incompetent.

8 Oregon 519, Tenny vs. Mulvaney.

The witness had already testified to the quality of the hops and their various grades as he judged them. The jury were then in the possession of the facts upon which this witness' opinion was given, and the opinion was not warranted by the facts and the witness afterwards contradicted it by facts; but it gave the jury the only basis they had for finding on the counterclaim.

4. The first objection to the testimony of Mr. Pilkington went to the whole of his testimony as incompetent, irrelevant and immaterial, and an attempt to impose in this case a standard different than that of the hop men.

This was the purpose of this witness' investigations, and he was permitted to testify freely thereto.

71 Oregon 612-613, Netter vs. Edmunson.

5. The testimony of the witness Pilkington in the 5th Assignment of Error was a mere abstract question of science, a statement of a fact that was of no value to any issue in the case. The witness did not at any time attempt to testify as to the amount of

resin in a mature hop, and this answer furnished no standard by which the jury could judge the question at issue whether the hops in question were mature or immature.

71 Oregon 611, Netter vs. Edmunson.

20 Am. & Eng. An. Cas. 205, State vs. Marvin.

Expert evidence should be carefully guarded. It is sufficiently dangerous when carefully circumscribed. It becomes altogether too unreliable when the basis of it is indefinite.

58 Atl. 940, Ivins vs. Jacob (N. J.).

11 R. C. L. 582, par. 13.

The testimony was to a single sample out of over 200 bales, and would be of no value on that account.

44 Pac. 546, Coast Elevator Co. vs. Bravinder, (Wash.).

18 Atl. at p. 918, Baltimore U. P. Co. vs. Baltimore.

Mr. Edmunson himself testified that every bale was tested by the buyer and regular samples for inspection in shipping were taken out of every tenth bale.

(Record, pp. 142, 143.)

6. The question in the 6th Assignment of Error called for hearsay testimony. The witness knew nothing about the quality of hops himself, and was relying upon the marks on the samples sent him.

9 Fed. 66, Pope vs. Filley.

He disclaimed *any* knowledge of the commercial

grades of hops.

132 Mass. 217, Perkins vs. Stickney.

130 U. S. 526, Stilwell Man. Co. vs. Phelps.

7. The Court at first rightfully sustained the objection to Mr. Pilkington testifying to the quantity of resin in the hops sent him by other parties; then the Court reversed the ruling and permitted an exception. The original ruling was:

"Unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. If you can show by this witness that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point."

(Record, pp. 34, 190-1.)

This was followed finally by this ruling:

"Now, if you know what a choice hop is in the market, why then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question."

The witness testified to the amount of resin that he found in the samples he examined.

The facts stated by this witness, coupled with the purpose of the offer as stated by Mr. Slater and other testimony, enabled the defense to build up the

theory. That the *average* sample of the Edmunson hops (Record, pp. 143, 195-6) was the *average* of the crop. That that sample had 18.15 per cent of total resins. That the *average* of total resins in the samples upon which Mr. Pilkington experimented was 18.39. That 18.39 per cent was the necessary amount of total resins to show that the hop was an *average* mature hop. Therefore the Edmunson hops were an *average* mature hop and within the contract.

Without the fact being shown, the jury, by this evidence, were asked to find that a hop containing 18.39 per cent of total resins were within the contract quality.

That there were 30,000 pounds of the Edmunson crop containing 18.15 per cent of total resins, and therefore there were 30,000 pounds of the Edmunson crop within the contract quality.

4 Atl. 575, Cole vs. Boardman.

92 U. S. 283-4, U. S. vs. Ross.

8. The 8th Assignment of Error is the motion to strike out all of the tsetimony of the witness Pilkington as incompetent, irrelevant and immaterial, and for the further reason that it assumes the proposition that a hop containing 18.15 per cent of total resins brings it within the quality described in the contract.

The Court ruled on the objection in the 4th Assignment of Error: There has been testimony here, coming from the witnesses produced by the plaintiff,

touching the amount of resin, or pollen as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury.

This ruling brings the case clearly within the decision of the Supreme Court of Oregon in Netter vs. Edmunson, 71 Oregon at p. 612.

"It may be said of all this evidence that it was immaterial; but it must be quite apparent that the evidence was well calculated to mislead and prejudice the jury in favor of the defendant, and plaintiff is entitled to a new trial."

4 Atl. 576, Cole vs. Boardman.

9. The 9th Assignment of Error is that the Court abused its discretion in denying plaintiff's motion for a new trial on the ground that there was no evidence in the case to sustain the judgment against the plaintiff.

To sustain the judgment, it was necessary that the defendants prove that they had enough hops of the quality described in the contract. The testimony as to the quantity over 20,000 pounds was mere conjecture, opinion, surmise and assumption, that forms no basis for an affirmative judgment. The principal testimony of this kind being the answer in the

3rd Assignment of Error, which the witness himself afterwards contradicted. (See pages 152, 160, record.)

"While it is a general rule that the allowance or refusal of a new trial rests in the sound discretion of the Court and will not be interfered with on a writ of error, it is well settled that this rule has no application where such allowance or refusal results from a clear abuse of discretion."

149 Fed. 141, McNicol vs. New York Life Ins. Co.

ARGUMENT

I. The first assignment of error is not very important in itself, but as the basis for a theory put forward by the defense in this case it becomes a potent factor in the trial before the jury.

Primarily, as the question and its immediate predecessors show, it was applied to the color of the hops. (Record, p. 123.) The counsel for the defense grasped the difficult problem of describing a "good and even color" of a hop, and made the most of by a severe cross examination of the witnesses; then came this question as the climax.

The colors of the hops were very fully described by the various witnesses. Some of the hops, 29 bales, were slack dried, two bales perished, there were brown buds in many of the bales, no one could possibly tell, describe or even guess what the *average* color of this crop of hops was. There is nothing in the contract that would warrant the jury in finding that

the *average* color of the crop came within the terms of the contract, and such a color could only be surmised or guessed at. It was wholly irrelevant to any issue in the case.

In the case of Tenny vs. Mulvaney, 8 Ore. 518, Lord, C. J., says with reference to the question of *average* logs under the contract:

"The contract was a written one, and the kind of logs to be furnished specified, and it was the agreement of plaintiffs to cut from the standing timber, within a mile from the bank of the creek, such logs only, without regard to the rotten trees and inferior timber, as would comply with the terms of the contract."

II. The question in the second assignment of error called for the experience of the defendant, J. M. Edmunson, as to the uniformity of grading by hop inspectors. The question before the jury was as to how far they would credit the examination and inspection of the hops by plaintiff's witnesses and their credibility in exactly describing the results of that inspection.

That there are experts and experts in the hop trade, the evidence in this case shows. Witnesses Hinkle, Bolam, Hart, Zeller, and Irwin, were all men who had large experience in the hop trade. Hayes. Edmunson and Heyer all had considerable experience in the hop business, but, as a rule, none of them were permitted to buy hops on their own inspection.

Heyer places some 20,000 to 25,000 pounds of these hops two grades higher than the plaintiff's witnesses. Edmunson does the same, and then places the remainder one grade above. Here, then, in the case itself, we have the lack of uniformity in the grading of hops by hop inspectors to the degree testified to by Edmunson. This shows that there are grades of inspectors, as well as grades of hops.

But the question objected to was asked with all seriousness as substantive evidence, and accepted as such by the Court, who ruled: "I think that is an inquiry about the quality, in effect, of the hops." And the jury having heard this ruling, certainly gave it force and effect in their verdict.

III. Mr. Edmunson testified that he *considered* that he had over 20,000 pounds of choice hops and that the rest would grade prime, except the seven or eight bales at the ripe end, the last picking. (Record, p. 145.) He then testified about the slack bales and described a medium hop, and immediately following was asked the question objected to calling for his opinion.

Being asked about the mold, he said, there was about 20,000 pounds that were free from mold, you might say. I call them free of mold. (P. 150, Record.) On cross examination he was asked:

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Wood picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run I don't know. (P. 152, Record.)

Again he testified:

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them anyway. They were a good prime hop, and a prime hop is not supposed to be perfect. (P. 156, Record.) Again he testified:

A. If they had taken enough, aside from the 20,000 pounds to fill out the contract, they would have had to take hops in which there was some mold.

A. There might have been some mold in it, yes. (P. 157, Record.)

The witness was laboring hard to show the jury that he had a crop of hops from which he could furnish enough to comply with the terms of the contract. This witness was graduated from the University of Oregon and had been admitted to the bar. (P. 161, Record.) He, therefore, could not be said to be at all ignorant of the force and effect of the English language. The Court's attention is called to the very careful manner of the witness not to testify positively to any fact with reference to the quality of

the hops. He says he *considered* that he had 20,000 pounds of choice hops. The verb consider means: "To think deliberately about; reflect upon; to give close attention to; ponder. 2. To regard in a certain aspect; look upon; hold; estimate." Standard Dictionary.

So that in the strongest use of the word, it was nothing more than an estimate of the amount. Again he *called* them "free of mold." "It is the way I graded them."

He *considered* he had 30,000 pounds of hops that were within the contract quality. In other words, he thought he had that quantity; he estimated he had that quantity. He never made a positive statement that he had that quantity and was very careful not to do so.

The witness at the time this question was asked had testified to the quantity of hops and the commercial grades, and the question and answer both assumed that a prime hop came within the terms of the contract, and he also testified that he did not know what a first quality hop was. (P. 168, Record.)

We submit that there was no necessity in this case calling for the opinion of the witness on the fact that the jury were required to pass upon; that was based upon unwarranted assumption and a mere guess.

IV, V, VI, VII, VIII. Assignments of error numbered four, five, six, seven and eight, all go to

the testimony of the witness Bert Pilkington, chemist in the Agricultural College of the State of Oregon. The quality of the hops in dispute herein as defined by the contract were as follows: "The said hops covered by this instrument shall be of first quality, i. e., of sound condition, of good and even color, fully matured but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter and not affected by spraying or vermin damage."

Plaintiff's witnesses testified that some of the hops were immature, and this was shown by a deficient quantity of lupulin in the hops inspected.

The Court held that the lupulin seemed to be the prime quality of the hops, and permitted this witness to testify as to the quantity he found in the samples sent him by Mr. Edmunson. This witness had adopted the theory that he could tell by the quantity of lupulin in the hop whether or not the hops had been judged correctly by different judges, and it was this theory that hop inspectors varied so much in their judging hops that it was necessary to prove some standard by which to test them.

The fourth assignment of error was not only on the ground that the testimony of the witness was incompetent, irrelevant and immaterial, but that it undertook to impose in this case a standard different from the hop men themselves in judging hops, and his theory of this matter was clearly incompetent and

irrelevant to the issues in this cause.

The defendants, by the testimony of this witness, sought to prove from the questions objected to in the fifth, sixth and seventh assignments, three facts. In the fifth that the sample of hops examined by the witness contained 18.15 per cent of total resins; that this amount of total resins in a hop showed a mature hop, or that it showed a hop that came within the quality in the contract provided. It was a mere assumption.

By the sixth assignment they undertook to prove that the witness had analyzed a number of samples of mature hops and sought to prove this by marks on the hops that had been sent to him for analysis. This witness was absolutely ignorant of the inspection of hops to determine their commerical quality in the usual way, nor did he add any testimony that he knew the amount of lupulin or resins necessary to a mature hop.

Then by the seventh assignment of error they undertook to prove from these samples that this witness had analyzed, what the average was of resins for a mature hop.

The witness himself testified to the quantity or percentage of resins in each sample, leaving it to the inference of the jury to draw the conclusion sought to be proven. He testified that he had analyzed twelve samples and was permitted to read from a pamphlet published by him what the amount of res-

ins were in each one of these samples. There was no attempt to show by any competent testimony that these samples that he had analyzed were mature hops, other than that they were classified, by somebody unknown, as "choice," "prime" and "medium," and the offer of this testimony made by the counsel for the defendants, was that they showed the average of 18.06 per cent of total resins, meaning for the jury to draw the inference that that was the average amount of resins in mature hops.

John Edmunson had testified that the sample he selected was an average sample of the crop. (P. 143, Record.) And this testimony was given without objection for the reason it seemed to be and only appeared to be preliminary, and this connected with the question objected to in the first assignment of error, gave the jury apparently the right to draw the inference that they had a right to determine that the contract quality was only for an average of the crop; that these samples mentioned in assignment number five were an average of the crop and that it contained 18.15 per cent of total resins; but the average of the samples analyzed by the witness contained about the same quantity; therefore the Edmunson hops had about the average quantity of total resins for a mature hop; therefore the hops were a mature hop. Aside from the testimony of Mr. Edmunson, mentioned in the third assignment of error, this was the only other testimony from which the

jury could possibly in any way infer that the defendants had 30,000 pounds of hops of the contract quality.

The testimony of the witness, Mr. Pilkington, gave a basis for nothing more than a guess and surmise and was utterly unreliable, incompetent and irrelevant and did not prove or tend to prove any issue in the case.

The witness did not show that he knew the quantity of resins in mature hops grown in the state of Oregon, or anywhere else. His testimony shows that he was a mere experimenter and nothing more, and upon a subject of which he was absolutely ignorant.

There is another element of uncertainty and doubt in this witness' testimony with reference to the hard and bitter resins. It is not shown by him, or in any other way, that these worthless resins run even through these hops or any other hops. This is left to inference and assumption.

The ruling of the Court was right in the first instance. That unless the witness could tell what the amount of resin was that was necessary for a choice hop, or a prime hop, or a medium hop, he would be incompetent to testify, and his testimony would not be competent, would be irrelevant to any issue in the case.

At the close of this witness' testimony a motion was made to strike out all his testimony as incompetent, irrelevant and immaterial, and for the further

reason that it assumed that a hop containing 18.15 per cent of total resins was a mature hop, or a hop within the terms of the contract.

The reading of the witness' testimony in this cause will show that it was highly prejudicial to the plaintiff's case and tended to inflame the minds of the jury and prejudice them against hop inspectors generally, and we submit that all this witness' testimony, and particularly the parts assigned as errors, is incompetent, irrelevant and immaterial to any issues of this cause, was confusing to the jury, had a tendency to mislead them and was highly prejudicial and assumed facts which were not in evidence.

A careful reading of all the testimony in reference to the quality and quantity of hops raised by Mr. Edmunson under this contract will disclose the fact that the plaintiff made an exceedingly strong case against the defendant; that this testimony was not overcome by the defendants' testimony; his own witnesses are against him, one of them, Frank S. Johnson, was strongly so, and Frank Heyer testified that there were only between twenty and twenty-five thousand pounds of hops that came within the contract, and the testimony of this witness further discloses all over the 20,000 pounds were a mere guess on his part, so that the case rested entirely, so far as the jury was concerned, upon the opinion of J. M. Edmunson and the unwarranted inference from the

testimony of Bert Pilkington, and the result arrived at by the jury giving an affirmative verdict against the plaintiff could only have been arrived at through prejudice brought about by the errors complained of herein. Viewing this testimony as a whole, it is apparent upon the face of this record that the errors complained of were vital elements in the trial of the case and the objections thereto of the plaintiff should have been sustained.

IX. The ninth assignment of error is the denial of the motion for a new trial. We realize the fact that the Courts have repeatedly held that an assignment of error based upon a denial of a motion for new trial will not be heard on Writ of Error, and yet there are authorities and it is a well established principle that this may be done when the Court has abused its discretion.

In this case there was no competent testimony upon which the jury could base an affirmative verdict in this case. Whether or not there was any testimony is a question of law for the Court, if there was not, it was of course a matter of weight for the jury, but we submit in all candor that the only parts of this testimony upon which the jury could at all base its finding for an affirmative verdict was no testimony at all, but only inference, surmise and guess.

We therefore submit that the Court abused its discretion in refusing to grant a new trial.

We respectfully submit that upon the errors com-

plained of the plaintiff is entitled to a reversal of this judgment and a new trial before a jury.

Respectfully submitted,

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